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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In Re the Application of:)
)
Todd Bolzer)
)
Serial No. 10/055,440) Appeal No. _____
)
Filed: January 23, 2002)
)
Title: ROTATIONALLY MOLDED) Group Art: 3727
SEPTIC TANK WITH RISER) Examiner: Stephen J. Castellano
)

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Attention: Board of Patent Appeals and Interferences

Sirs:

APPEAL BRIEF

This brief is filed, pursuant to 37 C.F.R. § 41.37, and in support of an appeal from the final rejection of all pending claims (claims 1-4 set forth in the Claims Appendix) as set forth in the Final Office Action (hereinafter "Action") dated August 5, 2004, attached hereto as Exhibit A.

I. REAL PARTY IN INTEREST

The real party in interest in this application and appeal is the assignee, Snyder Industries, a corporation duly organized and existing under the laws of the state of Nebraska, having a principal place of business at 4700 Freemont Street, Lincoln, Nebraska.

II. RELATED APPEALS AND INTERFERENCES

Applicant is not aware of any appeals or interferences which would directly affect or be directly affected by this Appeal or would have a bearing on the Board's decision in this Appeal.

III. STATUS OF CLAIMS

Claims 1-4 are currently pending in the present application, with claim 1 being the only independent claim presented for consideration.

Claims 1-20 were originally filed. The claims were subject to a restriction requirement, and claims 5-20 were withdrawn in response thereto. In the first Office Action, claim 1 was rejected under 35 U.S.C. § 102(b), and claims 2-4 were rejected under 35 U.S.C. § 103(a). In response to the first Office Action, claim 1 was amended. This amendment presents the pending claims that are reprinted for the Claims Appendix, Section VIII hereof.

In the Action dated August 5, 2004, attached hereto as Exhibit A, the Examiner issued a final rejection of claims 1-4, wherein, once again, claim 1 was rejected under 35 U.S.C. § 102(b) as being anticipated by the catalog of AK Industries, Inc. (hereinafter the "AKI Catalog"). Claim 1 was further rejected under 35 U.S.C. § 103(a) as being unpatentable over the AKI Catalog in view of Jones et al., U.S. Pat. No. 5,525,007 (hereinafter "Jones et al.") and Hall, U.S. Patent No. 4,187,647 (hereinafter "Hall"). Claim 2 was rejected under 35 U.S.C. § 103(a) as being unpatentable over the AKI Catalog in view of Jones, et al. and Hall, and further in view of Wittenberg, U.S. Patent No. 2,218,188 (hereinafter "Wittenberg"). Claim 2 was also rejected under 35 U.S.C. § 103(a) as being unpatentable over the AKI catalog in view of Jones, et al. and Hall, and further in view of Wittenberg and Seizert et al., U.S. Pat. No. 5,207,463 (hereinafter "Seizert et al."). The Action did not state the basis for the rejections of claims 3 and 4. However, it is presumed by Applicant that the second listed rejection of claim 2, which is an almost verbatim recitation of the rejection of claims 3 and 4 as set forth in the first Office Action, was intended to recite claims 3 and 4, and will

be treated as such in this Appeal. In response to the final rejection of claims 1-4, a Notice of Appeal was filed on December 3, 2004.

IV. STATUS OF AMENDMENT

All amendments submitted by Applicant have been entered. No amendment has been filed in the above-referenced patent application subsequent to the final rejection.

V. SUMMARY OF CLAIMED SUBJECT MATTER

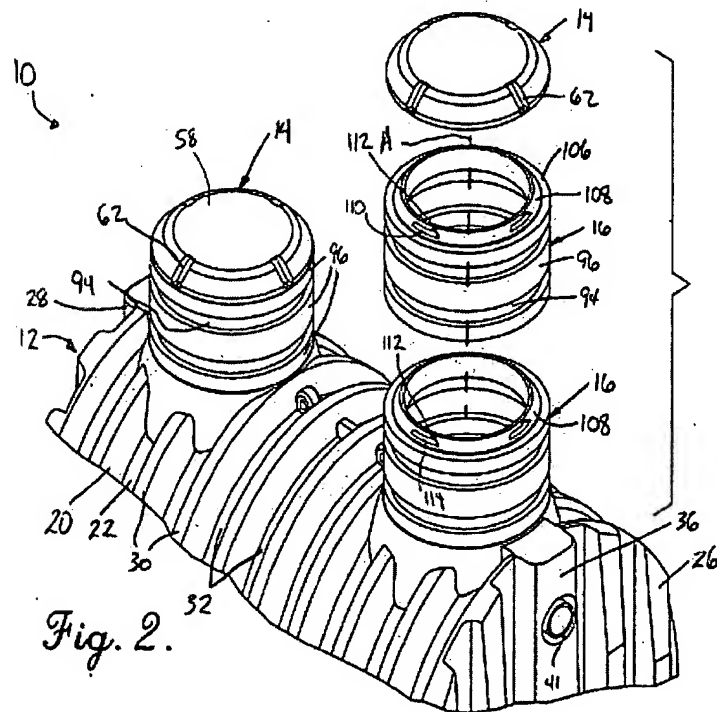
To assist in the appreciation of the invention, FIGS. 1-9 of the present application are attached hereto as Exhibit B. For the convenience of the Board, reference labels used in the drawings and description of the present application will be provided herein.

The present invention relates in general to the field of rotationally molded subterranean tanks for receiving sewage or serving as a cistern for holding water. More particularly, the present invention involves such tanks buried below grade, and having a portal arrangement for accommodating a uniquely and complementally configured cover, and a synthetic resin riser for positioning between the portal and the cover, wherein the riser may be trimmed at multiple locations along its axial length, while retaining its ability to couple to the tank and receive a cover thereon.

The present invention is directed to solving the problem of permitting access to the interior of subterranean tanks, specifically to employing risers of varying lengths between the portal of the vessel and the cover to compensate for the ultimate depth of the tank while permitting access to the opening through the riser. This problem is solved by the tank assembly of the present invention, which provides a riser which may be used in its initial configuration, or trimmed at a number of predetermined locations along its axial length and still remain complementally configured to mate with both the portal and the cover of the assembly. In this manner, a single riser of a standard length

may be trimmed to a desired height to couple with the below-grade vessel and receive the cover thereon at or above the grade, without the necessity of having a number of risers of different lengths present at the installation site.

The invention can best be seen by reference to FIGS. 2, 4 and 6 thereof:



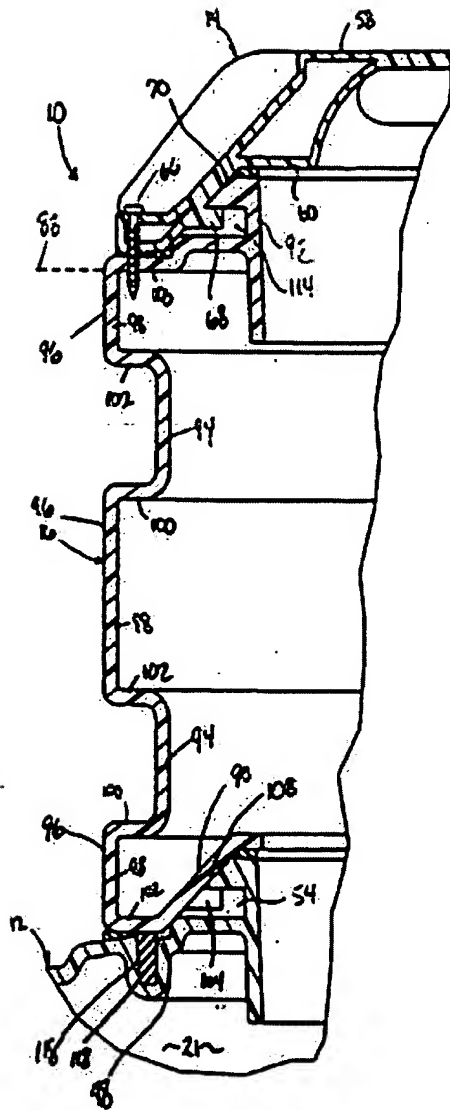


Fig. 4.

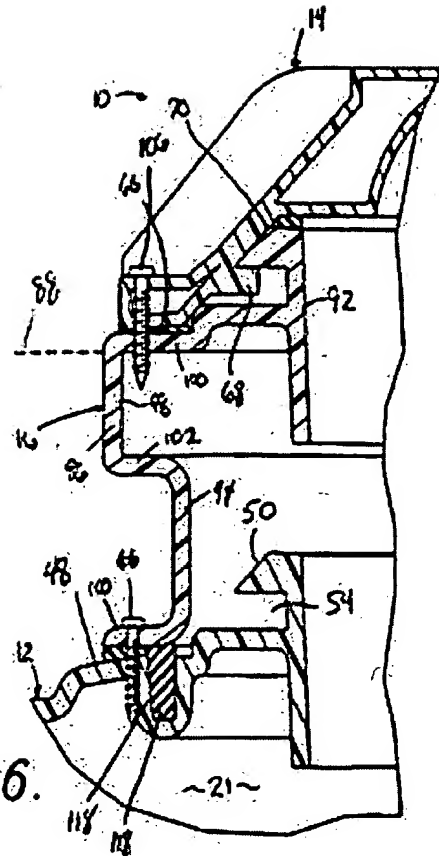


Fig. 6.

As set forth in independent claim 1, Applicant's invention is directed to a subterranean tank assembly 10 for storing liquid below grade, the assembly comprising a vessel 12, a cover 14 and a riser 16. The vessel 12 defines a liquid-receiving chamber 21 having at least one portal 42 projecting upwardly from the vessel wall to present an opening 44 for gaining access to the chamber. The

portal 42 includes a rim having a substantially horizontal closure surface 48 surrounding the opening and an inwardly tapering receiving surface 50. The riser 16, to be positioned between the rim and the cover, is substantially tubular, with an upright longitudinal axis, and is adapted for coupling to and elevating the cover 14 to a position at or above grade. Riser 16 includes a bottommost connector portion 90 for coupling to the rim, the connector portion including an inwardly tapering surface complementally configured for mating with the vessel receiving surface 50, and a topmost connector portion 92 for coupling to the cover 14. The riser 16 further includes a continuous and uninterrupted cylindrical riser wall 94, and a plurality of axially spaced continuous and circumscribing ribs 96 positioned radially outward of the riser wall 94, each of the ribs including a pair of substantially horizontal flanges 100, 102 connecting the ribs 96 to the riser wall 94, each of the flanges 100, 102 being complementally sized and configured for mating with the vessel rim. A circumscribing cut through one of the ribs 96 or the riser wall 94 adjacent the flange 100, 102 will reduce the longitudinal length of the riser 16, and the remaining bottommost flange of the riser 16 may then be coupled to the rim.

The structure recited in independent claim 1 enables a subterranean tank assembly that provides several advantages. One advantage is that the assembly provides a sealable, adjustable length riser. This advantage is obtained by having a riser constructed of lightweight resin material with at least one pair of horizontal flanges, each of which are adapted for sealingly engaging the rim subsequent to any trimming of the riser which may take place, as is depicted in FIG. 6. Another advantage is an additional sealing engagement between the riser and rim that is self-seating. This is provided by the inwardly tapering receiving surface of the rim and the complementally configured inwardly tapering surface of the bottommost connector portion of the riser, as shown in FIG. 4.

Other aspects of the invention are presented in claims 2-4, all of which depend directly or indirectly from claim 1. Claim 2 depends from claim 1, and recites the cover including an interior wall surface with at least one lug oriented substantially radially inwardly, and the rim including an outer wall surface with at least one complementally configured recess to receive the lug. Claim 3 depends from claim 1, and recites the rim including a circumferentially extending elastomeric seal surrounding the opening to engage with either the bottommost connector portion of the riser, or when the bottommost connector portion has been removed, the bottommost flange of the riser. Claim 4 depends from claim 3, and recites the rim including a circumferentially extending slot for receiving a part of the elastomeric seal.

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

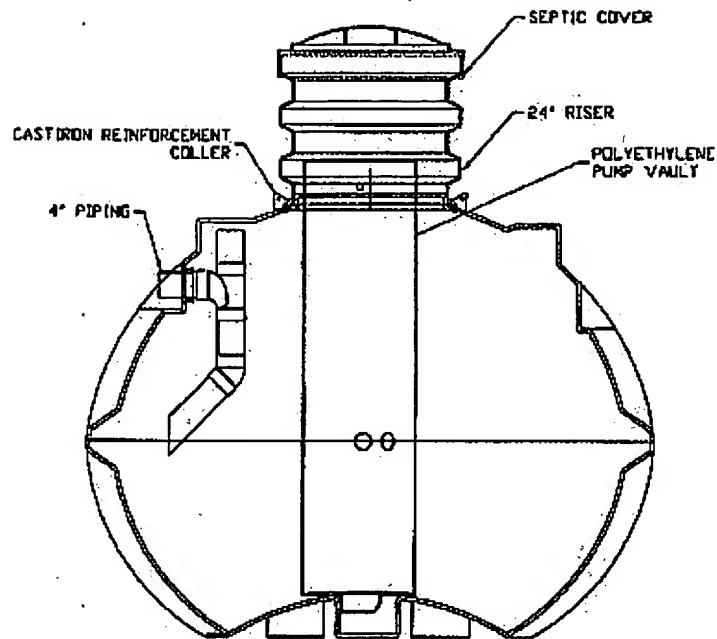
- 1. Claim 1 stands rejected as being anticipated under 35 U.S.C. § 102(b) by the AKI Catalog.**
- 2. Claim 1 stands rejected as being unpatentable under 35 U.S.C. § 103(a) over the AKI Catalog in view of Jones et al. and Hall.**
- 3. Claim 2 stands rejected as being unpatentable under 35 U.S.C. § 103(a) over the AKI Catalog in view of Jones et al. and Hall as applied to claim 1, and further in view of Wittenberg.**
- 4. Claim [2] *sic* stands rejected as being unpatentable under 35 U.S.C. § 103(a) over the AKI Catalog in view of Jones et al. and Hall as applied to claim 1, and further in view of Wittenberg and Seizert et al.**

VII. ARGUMENTS

1. **The Examiner's Final Rejection of Claim 1 Under § 102(b) is Improper Because the AKI Catalog Fails to Disclose All of the Limitations of Claim 1.**

In order for a reference to anticipate, it must disclose every element of the claimed invention and must enable a skilled artisan to practice the claimed invention. “[I]nvalidity by anticipation requires that the four corners of a single, prior art document describe every element of the claimed invention, either expressly or inherently, such that a person of ordinary skill in the art could practice the invention without undue experimentation.” Advanced Display Systems, Inc. v. Kent State University, 54 USPQ2d 1673, 1679 (Fed. Cir. 2000); see, also, PPG Ind. Inc. v. Guardian Ind. Corp., 37 USPQ2d 1618, 1624 (Fed. Cir. 1996)(“To anticipate a claim, a reference must disclose every element of the challenged claim and enable one skilled in the art to make the anticipating subject matter”). Furthermore, the elements must be arranged as in the claim. See, Richardson v. Suzuki Motor Co., 9 USPQ2d 1913, 1920 (Fed. Cir. 1989). In sum, “[t]he identical invention must be shown in as complete detail as is contained in the patent claim.” Id.

The AKI Catalog reference has been cited in the Action as anticipating the invention of claim 1 under 35 U.S.C. § 102(b). This reference discloses a septic tank having a vessel, a riser, and a cover, as schematically represented on page 12 of the catalog:



The vessel has an upwardly projecting portal, as can be seen on page 6. Various sizes of synthetic resin risers are shown on page 7. These risers disclose a number of axially spaced, circumscribing ribs spaced outwardly of the riser wall, the ribs including substantially horizontal flanges. As shown in the drawing on page 12, reproduced above, the riser connects to the portal by means of a cast iron reinforcement collar, and a cover is connected to the top of the riser.

The AKI Catalog fails to show or suggest the use of structure recited in claim 1. Specifically, claim 1 recites flanges each of which are complementally sized and configured relative to the rim, whereby a circumscribing cut through one of the ribs or the riser wall adjacent the flange reduces the longitudinal length of the riser, and whereby the remaining, normally bottommost flange of the riser may be coupled to the rim in sealing engagement. The disclosure of the AKI Catalog fails to teach this limitation. Not only is the AKI Catalog silent as to the ability to trim the risers in length by a

circumscribing cut and still fit the riser to the rim of the vessel, but the structure shown by the risers of the AKI Catalog and the vessels shown therein are not complementally configured to permit such adjustment. The risers depicted on page 7 of the AKI Catalog which are sized to permit gaining access to the chamber of the vessel have an outwardly projecting flange of a dimension greater than the ribs. Thus, the risers are not constructed to be capable of being trimmed in length, because the ribs (and their flanges) of the AKI Catalog would not then fit in sealing engagement with the vessel rim. The schematic drawing on page 12, reproduced above, shows that the riser does not sealingly engage with the rim of the tank at all, because the riser rests on the cast iron reinforcement collar, and there is a clearance between the rim of the tank and the inner wall of the riser. Certainly there is no teaching nor even a suggestion to provide a riser which may be cut circumferentially and still seal to the rim of the vessel in the AKI Catalog.

In the present claimed invention, the vessel, cover and riser must be complementally configured in order to achieve the desired result, such that the cover can be coupled either directly to the vessel in some applications or to the riser in others, and that the riser be configured so that it seals with the rim in either an initial configuration, as in FIG. 4 of the application, or in a trimmed condition where the length is reduced by a circumscribing cut, as in FIG. 6 of the application. While the AKI Catalog shows the cover mounted either on the vessel directly, as at page 9, or on a riser as at page 7, there is certainly nothing in the reference to suggest that the riser may be trimmed in length and still seal against the rim of the vessel in the AKI Catalog while still accepting the cover. Put another way, the AKI Catalog does not teach the use of a rim which is configured to accept in sealing engagement a cover, a riser in an initial condition, or a complementally sized and configured flange of a trimmed riser.~

Furthermore, claim 1 as amended in the response to the first Office Action recites that the portal include "an inwardly tapering receiving surface", and that the riser has a normally bottommost connector portion for coupling to the rim, this connector portion including "an inwardly tapering surface complementally configured for mating with said receiving surface of said vessel in sealing engagement". The AKI Catalog fails to show or suggest an inwardly tapering receiving surface of the rim and a complementally configured inwardly tapering surface of this connector portion of the riser. The Action even recognizes that these elements are not shown nor suggested in the reference: "The AKI catalog discloses the invention *except for* an inwardly tapering receiving surface on the portal rim of the vessel and an inwardly tapering complementary surface on the bottommost connector portion of the riser." (Action, August 5, 2004, p. 3. Emphasis added).

In the present case, and by the Examiner's own admission, the AKI Catalog fails to describe each and every element of, and therefore does not and can not anticipate, claim 1. It is thus respectfully submitted that the rejection under 35 U.S.C. § 102(b) rejection is in error, and should be reversed.

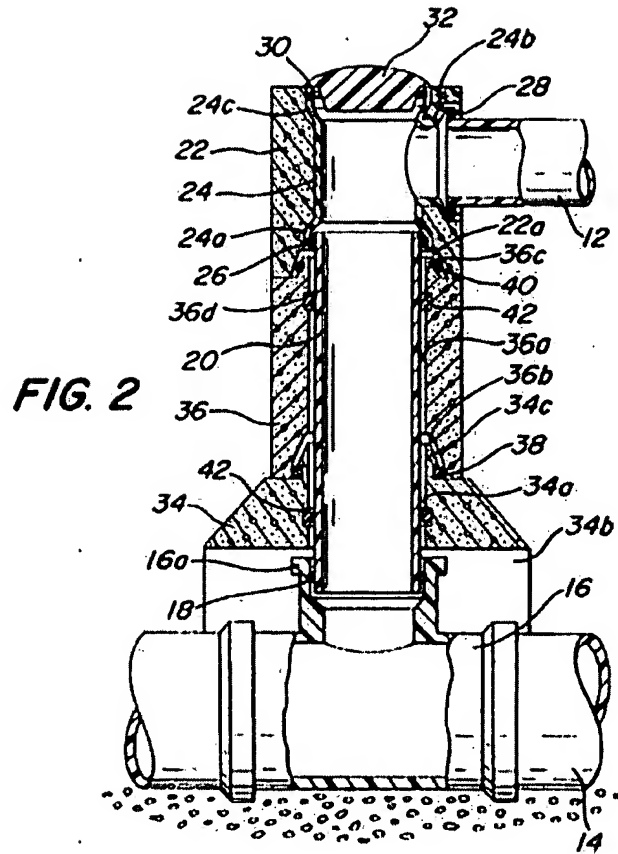
2. **The Examiner's Final Rejection of Claim 1 Under § 103(a) is Improper Because the Cited Art Fails to Disclose All of the Limitations of Claim 1, and Further Because There is No Motivation to Modify or Combine the References.**

The Examiner has the initial burden of presenting a prima facie case of obviousness under 35 U.S.C. § 103(a)(Supp. 1998). In Graham v. John Deere Co., 383 U.S. 1, 14, 148 USPQ 459, 465 (1966), the Supreme Court held that a claimed invention is unpatentable if the differences between it and the prior art "are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art." The ultimate determination of whether an invention is or is not obvious is a legal conclusion based on underlying factual inquiries

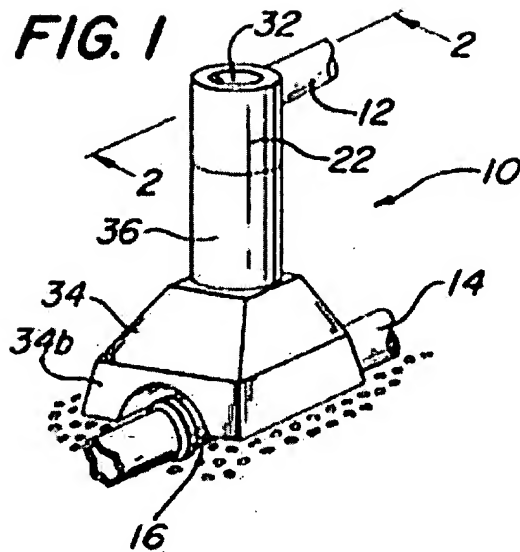
including: (1) the scope and content of the prior art; (2) the level of ordinary skill in the prior art; (3) the differences between the claimed invention and the prior art; and (4) objective evidence of nonobviousness. See Graham, 383 U.S. at 17-18, 148 USPQ at 467; In re Dembiczak, 50 USPQ2d 1614, 1616 (Fed. Cir. 1999).

The obviousness rejection of claim 1 is based on the AKI Catalog in view of Jones et al. and Hall. Thus, all of the limitations of this claim must be found within these three references either singularly or in combination, and there must be some teaching or suggestion in these references to combine or modify them as necessary. See, In re Kotzab, 55 USPQ2d 1313, 1316-17 (Fed. Cir. 2000). The suggestion, motivation or teaching may be explicitly stated in the prior art, arise from the knowledge of one of ordinary skill in the art, or, in some cases stem from the nature of the problem to be solved. Id. at 1317. The teachings may be implicit in the prior art, the test being “what the combined teachings, knowledge of one of ordinary skill in the art, and the nature of the problem to be solved as a whole would have suggested to those of ordinary skill in the art.” Id. Finally, the mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification. In re Fritch, 23 USPQ2d 1780, 1783-84 (Fed. Cir. 1992). In the present case, a prima facie case of obviousness simply has not been met. The Examiner relies on references, whether taken singularly or in combination, that do not disclose all of the limitations of the claim, and a motivation to combine or modify the references has not been shown.

Jones et al. discloses a sewer chimney construction for connecting a branch service line to an underground sewer main, as is depicted in FIG. 2 thereof:



The chimney comprises a prefabricated concrete pipe encasement 36 encircling a riser 20 and extending between the portal of a tee-fitting 16 and a concrete cap block 22 located at a branch service line 12. The cap block 22 is rotatably positioned above riser 20 to align with service line 12. Removable cover 32 is received on an upper end of cap block 22. Riser 20 is surrounded and supported by a concrete base or bridge 34 and intermediate concrete pipe encasement 36. The upper end of riser 20 is inserted into cap block 22. The concrete bridge 34 includes a bifurcated foot 34b that straddles the tee-fitting 16 and rests entirely on an earth or stone bed, as best seen in FIG. 1 of that reference:



Jones et al. fail to show or suggest the use of structure recited in claim 1. Specifically, Jones et al. fail to show or suggest a vessel with a rim having an inwardly tapering receiving surface, or a riser of synthetic resin material having a connector portion with an inwardly tapering surface that is complementally configured and in sealing engagement with the receiving surface. Instead, Jones et al. disclose riser 20 received by a bell socket 16a of tee-fitting 16. The bell socket 16a includes an internally tapered surface, but the mating end of the riser 20 has a squarely cut surface rather than a tapered surface. This squarely cut surface teaches away from the use of complementally configured tapering surfaces. The riser 20 and tee-fitting 16, therefore, do not have mating complementally configured tapering surfaces.

In the Action, it is alleged that Jones et al. disclose a portal rim having an inwardly tapering receiving surface, and an inwardly tapering complementary surface on the bottommost connector portion of the riser, and thus supplies the claimed element missing from the AKI Catalog. However,

the "riser" as it is discussed in the Action is mischaracterized. The asserted "riser" is instead a concrete pipe encasement 36 surrounding the actual riser 20, and is not in sealing engagement with a receiving surface of a vessel rim. The vessel, tee-fitting 16, does not even come into direct contact with the concrete pipe encasement 36. The bridge 34 includes tapered spigot 34c, which is received within complementally shaped bell socket 36b of pipe encasement 36. However, bridge 34 is not part of the asserted vessel, nor is it a vessel itself. Rather, the bifurcated foot 34b, as shown particularly in FIG. 1 above, only straddles the vessel, tee-fitting 16, and rests "entirely on an earth or stone bed." (See, col. 3, ll. 25-34). In this manner, the bifurcated foot 34b of bridge 34 aligns with the pipe encasement 36 to provide alignment support between the vessel (specifically, between the bell socket 16a of tee-fitting 16) and the riser 20.

It is stated in the Action that the teachings of Jones et al. can modify the AKI Catalog to render obvious the use of an inwardly tapering receiving surface on the portal rim of the vessel and an inwardly tapering complementary surface on the bottommost connector portion of the riser. However, the combination of the AKI Catalog and the Jones et al. '007 patent simply does not arrive at the invention. Not only does the AKI Catalog fail to disclose these inwardly tapering surfaces, as conceded in the Action, but Jones et al. likewise fails to disclose such complementary inwardly tapering surfaces on the riser and on the portal. Indeed, Jones et al. actually teach away from the use of an inwardly tapering complementary surface on the riser by disclosing a squarely cut end of riser 20 that mates with the tee-fitting 16.

Hall discloses a plurality of plastic extender rings 15 for use as manhole extender elements. These rings can be seen in FIGS. 2 and 3 thereof.

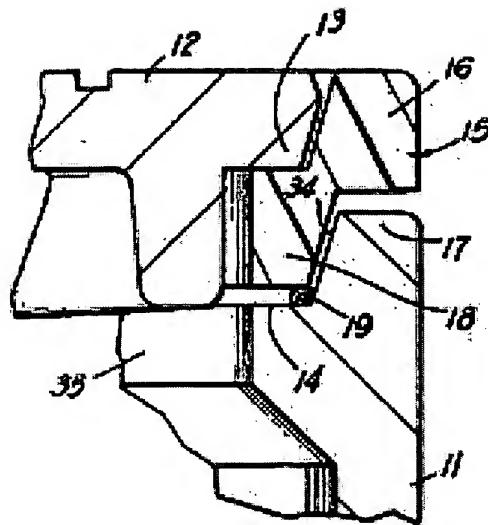


FIG 3

Manhole 10 is covered by a cast iron top ring 11, and a cast iron cover 12 is seated above top ring 11. One to three plastic extender rings 15 can be positioned in a nesting arrangement between top ring 11 and cover 12. Rings 15 are seated on adhesive 19 to permanently position them in their installed position. The plastic extender rings 15 are formed of two annular concentric, different diameter ring segments, including a lower smaller annular ring section 18 and an upper larger marginal ring portion 16. This configuration is best understood by reference to FIG. 6 of Hall:

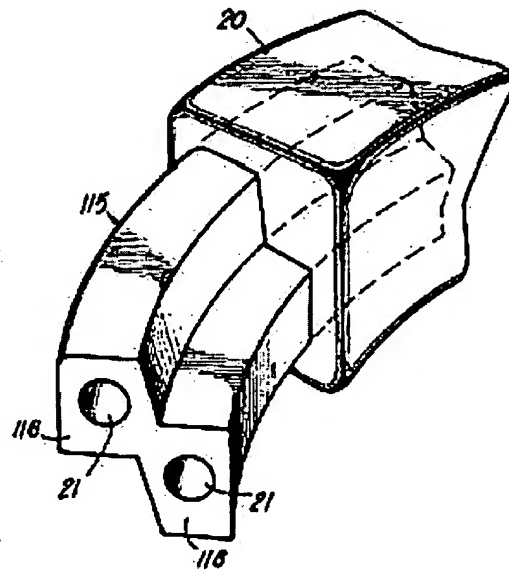


FIG 6

Rings 15 can be extruded as a helix from a die 20, and trimmed along its circumference to provide a ring with a particular diameter. The discrete ends of the rings 15 are then mated with each other and are secured together with adhesive 19. Alternatively, rings 15 can be molded in arcuate segments and joined end-to-end with adhesive 19. As shown in FIG. 2, the lower annular ring section 18 is seated on a shoulder 14 of cast iron top ring 11, with caulking 19 between the shoulder

14 and lower section 18. Upper ring portion 16 extends upwardly and outwardly from lower section 18.

It is suggested in the Action that the teachings of Hall can be combined with Jones et al. to modify the riser of the AKI Catalog to render obvious the use of an inwardly tapering receiving surface on the portal rim of the vessel and an inwardly tapering complementary surface on the bottommost connector portion of the riser. However, the combination of the AKI Catalog, Jones et al., and Hall simply does not arrive at the invention. It is conceded in the Action that the AKI Catalog does not include these claimed elements, nor does Jones et al. (as discussed in detail above). Similarly, Hall fails to disclose these claimed complementally tapering surfaces. Specifically, the upper ring section 16 extends upwardly and outwardly from lower section 18. Thus, the surface of wall 27 of lower section 18 is actually an outwardly tapering surface. Likewise, the surface of inner wall 34 of cast iron ring 11, against which wall 27 is nested, is also an outwardly tapering surface. Thus, even if the AKI Catalog, Hall and Jones et al. were properly combined, the resulting device would still not include the inwardly tapering surfaces of the portal rim and of the bottommost connector portion of the riser, as is set forth in the present claimed invention.

Therefore, because the proposed combination of the references fails to arrive at the claimed invention, a prima facie case of obviousness has not been established, see Manual of Patent Examining Procedure (M.P.E.P.) §§ 2142, 2143 and 2143.03 (8th Ed. 2001), and the obviousness rejection must consequently be reversed.

Even if, arguendo, the suggested combination included all of the limitations of the present claimed invention (and it does not), the Examiner offers no motivation to combine the references. The only statement made in the Action is the “[I]t would have been obvious to modify the

configuration of the riser to vessel connection to include both a horizontal surface on the vessel rim and inwardly tapering surfaces to provide an aligning fit to ensure that the riser is properly centered and to ensure that the top of the riser is situated horizontally.” (Action, August 5, 2004, p. 4.) There is clearly no teaching or suggestion, much less any motivation in either reference, to modify the riser disclosed in the AKI Catalog by reconfiguring the bottom portion of that riser to include a tapered surface. The riser of the AKI Catalog has stated means for mating with the vessel (note the cast iron reinforcement collar depicted on page 12 of that reference), and thus one skilled in the art would not look to Jones et al. or Hall to find alternative mating features.

Further, with respect to Jones et al., there no motivation or suggestion therein to modify the teachings of the AKI Catalog to provide the claimed adjustable length riser or the inwardly tapering complementally configured surfaces. The pipe encasement 36 is not a riser adapted for coupling to the rim of the vessel and to the cover. Instead, the pipe encasement 36 is adapted to stabilize underground conduits from movement, and connects the concrete base or bridge 34, which straddles but does not contact the vessel (tee-fitting 16), with the concrete cap block 22. Moreover, the Jones et al. reference does not teach that its steel-reinforced concrete pipe encasement 36 is capable of being trimmed to create an adjustable length device. Indeed, such steel-reinforced concrete material would not readily be capable of being trimmed, as is the adjustable length synthetic resin riser of the present claimed invention. There simply is no motivation or suggestion in either reference to utilize the steel-reinforced concrete pipe encasement structure of Jones et al. to adapt the risers of the AKI Catalog to provide a trimmable riser for a septic tank assembly, which tank assembly includes the complementally tapered surfaces of the vessel rim and of the riser, as set forth in claim 1 of the present invention.

Similarly, there is no motivation in Hall to modify the teachings of the AKI Catalog. Hall teaches the use of individual plastic extender rings for raising the height of a cast iron manhole cover. The application involves exposure to the weight and associated vibration from vehicles passing directly over the cover. (Col. 1, ll 36-38). Such construction for use in "heavy traffic" is directed to a different problem from that posed in the AKI Catalog. The AKI Catalog teaches plastic septic tanks having plastic risers and covers that are not suitable for use in heavy traffic applications, such as those road applications in which the manhole covers of Hall are utilized. Indeed, the AKI Catalog specifically excludes their risers from use in such heavy traffic applications, stating that their products are "[S]uitable for light lawn traffic (light lawn tractors no vehicles)". (AKI Catalog, p. 12). Thus, there would be no incentive to combine the heavy traffic extender rings with the plastic septic tank risers of the AKI Catalog.

Thus, not only does the cited combination not reach the claimed invention, there is no motivation to combine these references, and thus the cited combination is improper for the intended purpose under § 103(a). Therefore, since the AKI Catalog in view of Jones et al. and Hall fails to disclose every limitation of claim 1, and further since there is no motivation, teaching or suggestion for their combination, the § 103(a) rejection in relation thereto should be reversed.

3. **The Examiner's Final Rejection of Claim 2 Under § 103(a) is Improper Because the Cited Art Fails to Disclose All of the Limitations of Underlying Claim 1, and Further Because There is No Motivation to Modify or Combine the References.**

In the obviousness rejection of claim 2, the Wittenberg patent is not relevant to the applicant's field of endeavor or the problem with which he is confronted and therefore constitutes non-analogous

art. The test for determining whether a reference is analagous or non-analagous art is clearly stated in In re Deminiski, 230 USPQ 313, 315 (Fed. Cir. 1986) as follows:

The determination that a reference is from a nonanalagous art is therefore twofold.

First, we decide if the reference is within the field of the inventor's endeavor. If it is not, we proceed to determine whether the reference is reasonably pertinent to the problem with which the inventor was involved. *Id.*

While the AKI Catalog is concerned with septic tanks, risers and covers, Wittenberg is concerned with a pressure cooker, and is nonanalagous art. Applying the foregoing test, it is clear that this reference should not have been considered or applied as prior art to the present invention. Pressure cookers are clearly outside the field with which the applicant is concerned, which is underground storage and septic tanks. There is clearly no connection between pressure cookers and septic tanks. Moreover, this reference is not pertinent to the problem with which the inventor was involved. Here, the inventor was concerned with the problem of providing an adjustable riser for buried vessels which would avoid the necessity of having multiple risers on site as needed depending on the final grade of the vessel cover. Pressure cookers have absolutely nothing to do with this problem.

The situation in this regard is similar to the case of In re Oetiker, 24 USPQ2d 1443, 1446 (Fed.Cir. 1992), where the Federal Circuit indicated that it had not been shown that "a person of ordinary skill, seeking to solve a problem of fastening a hose clamp, would look to fasteners for garments. The combination of elements from non-analagous sources, in a manner that reconstructs the applicant's invention only with the benefit of hindsight, is insufficient to present a *prima facie* case of obviousness." Similar guidance may be found in the case of In re Clay, 23 USPQ2d 1767 (Fed. Cir. 1993), where the Federal Circuit held that a reference to a patent disclosing "a process for

reducing the permeability of hydrocarbon-bearing formations and thus improving oil production, using a gel similar to that in the applicant's invention" was not analogous art, where the applicant disclosed and claimed "a process for storing refined liquid hydrocarbon product in a storage tank having a dead volume between the tank bottom and its outlet port."

Even if Wittenberg were found to be analogous art, the rejection of claim 2 in the Action can not be properly maintained. Wittenberg is cited in the Action for disclosing a lug on the cover and a recess on the vessel rim. It is suggested in the Action that the teachings of Wittenberg can modify the AKI Catalog and the Hall and Jones et al. patents to make obvious the use of a lug and recess arrangement in connection with a subterranean tank assembly having an adjustable length riser. However, there is no motivation in Wittenberg for combining its pressure cooker with a subterranean tank assembly. Wittenberg discloses, as depicted in FIG. 1, a pressure cooker including a body 2 and a cover 3 respectively having handles 4, 5. In FIG. 11, the body 41 and cover 44 have lugs 46, 47 to place the cover 44 into interlocking engagement with the body 41. A gasket 43 is disposed in seat 42 of the body 41 and compressed between seat 42 and face 45 of the cover 44. Wittenberg fails to show or suggest the use of structure recited in claim 2. For example, Wittenberg fails to show or suggest any type of riser between body 41 and cover 44. Since Wittenberg does not disclose or suggest a riser, it cannot disclose or suggest a riser having a pair of flanges that are complementally sized and configured relative to the rim. Wittenberg, like the AKI Catalog, Jones et al. and Hall, also fails to show or suggest an inwardly tapering receiving surface on the rim, or a complementally configured inwardly tapering surface on the bottommost connector portion of a riser.

Thus, even if Wittenberg were to be combined with the AKI Catalog and the Hall and Jones et al. patents, such a combination simply fails to arrive at the invention of claim 2. Further, there is

no motivation in Wittenberg to combine its securing means with a riser and cover assembly for a subterranean tank. In view of this lack of motivation, and of the fact that Wittenberg is non-analogous art, this combination of references is improper. Therefore, as the cited combination fails to reach the claimed invention, and as the cited combination is improper, the § 103(a) rejection of claim 2 should be reversed.

4. **The Examiner's Final Rejection of Claim [2] *sic* Under § 103(a) is Improper Because the Cited Art Fails to Disclose All of the Limitations of Underlying Claim 1, and Further Because There is No Motivation to Modify or Combine the References.**

In the Action, the second rejection of claim 2 (in view of the combination of the AKI Catalog, Jones et al., Hall, and further in view of Wittenberg and Seizert et al.) appears to be a restatement of the rejection of claims 3 and 4 as set forth in the first Office Action. Accordingly, as claims 3 and 4 are listed on the Office Action Summary sheet as being rejected, it is assumed for the purposes of the arguments presented this Appeal Brief that this rejection was intended to recite claims 3 and 4, and not claim 2. Accordingly, the following arguments will reflect this assumption.

Like Wittenberg, Seizert et al. is also non-analogous art. Under the teachings of the caselaw cited above, as the AKI Catalog is concerned with septic tanks, risers and covers, it is clear that the automobile fuel tank of Seizert et al. is non-analogous art. Automobile fuel tanks are outside the field with which the applicant is concerned, i.e., underground storage and septic tanks. Further, this reference is not at all relevant to the problem of providing adjustable risers for subterranean tanks. Thus, this cited combination of non-analogous art is not proper.

Even if Seizert et al. were analogous art, the rejection of claims 3 and 4 in the Action can not be properly maintained. Wittenberg and Seizert et al. are cited in the Action for disclosing a seal and a slot in the rim of a vessel for receiving the seal. Seizert et al. discloses, in FIG. 6, a fuel tank 16

attached to a fuel sender assembly 14. The fuel sender assembly 14 includes a sender plate 45 that contacts a planar surface 21 of the fuel tank 16. The planar surface 21 has a groove 22 that retains a seal member 44 between the groove 22 and the sender plate 45. Both Wittenberg and Seizert et al. fail to show or suggest the structure recited in claims 3 and 4. As discussed above, Wittenberg fails to show or suggest a riser of any type, and thus fails to show or suggest a riser with complementally sized and configured flanges and a complementally configured inwardly tapering receiving surface. Seizert et al. also fails to show or suggest a riser of any type, particularly one having those features. Instead, Seizert discloses a cover (fuel sender assembly 14) in direct contact with the fuel tank 16. None of the cited references show or suggest the complementally tapered surfaces of the rim and of the riser, as recited in the present claims. Thus, even if Wittenberg and Seizert et al. were properly combined with the AKI Catalog and the Hall and Jones et al. patents, such a combination fails to arrive at the invention of claims 3 and 4.

It is suggested in the Action that the teachings of Wittenberg and Seizert et al. can modify the AKI catalog and the Hall and Jones et al. patents to make obvious the use of a slot and seal arrangement in connection with a subterranean tank assembly having an adjustable length riser. However, not only does such a combination not reach the claimed invention, there is simply no motivation in any of the references to use the sealing mechanism taught in Wittenberg or Seizert et al. to modify the closure mechanism taught in the AKI Catalog. "[T]here must be some reason, suggestion or motivation found in the prior art whereby a person of ordinary skill in the field of the invention would make the combination. That knowledge can not come from the applicant's invention itself." In re Oetiker, 24 USPQ2d at 1446. In the present case, there is absolutely no teaching or suggestion as to how or why one would take the lid of a pressure cooker or the seal of

a gasoline tank and apply them to a septic tank assembly, nor any suggestion as to where or how this would be done to effect the claimed invention. Such can only have come from an impermissible hindsight reconstruction of the invention.

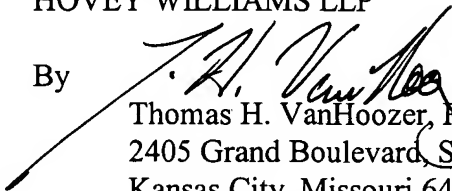
Thus, even if Wittenberg and Seizert et al. were to be combined with the AKI Catalog and the Hall and Jones et al. patents, such a combination simply fails to arrive at the invention of claims 3 and 4. Further, there is no motivation in Wittenberg or Seizert et al. to combine their slot and seal assemblies with a riser and cover assembly for a subterranean tank. In view of this lack of motivation, and of the fact that Wittenberg and Seizert et al. are non-analogous art, this combination of references is improper. Therefore, as the cited combination fails to reach the claimed invention, and as the cited combination is improper, the § 103(a) rejection of claims 3 and 4 should be reversed.

5. Conclusion

For the foregoing reasons, it is respectfully submitted that the pending claims patentably distinguish over the applied prior art and should be deemed to be allowable. Applicant thus courteously requests that the rejection of claims 1-4 be reversed and that these claims be deemed allowable. The required filing fee as set forth in §41.20(b)(2) is enclosed herewith. In addition, the Office is authorized to deduct any additional required fees which might be due in connection with this appeal from Deposit Account No. 19-0522.

Respectfully submitted,
HOVEY WILLIAMS LLP

By



Thomas H. VanHoozer, Reg. No. 32,761
2405 Grand Boulevard, Suite 400
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ATTORNEYS FOR APPLICANT

(Docket No. 32183)

VIII. CLAIMS APPENDIX

1. (Previously Amended) A subterranean tank assembly for storing liquid below grade, said tank assembly comprising:

a vessel having a vessel wall of molded synthetic resin material defining a liquid-receiving chamber therein and at least one portal projecting generally upwardly from the vessel wall and presenting an opening for gaining access to the chamber, said portal including a rim having a substantially horizontal circumferentially extending closure surface in surrounding relationship to the opening and an inwardly tapering receiving surface;

a cover of synthetic resin material; and

a riser of synthetic resin material for coupling to and elevating the cover to a position at or above grade and positioned intermediate said rim and said cover, said riser being substantially tubular and presenting a normally upright longitudinal axis and including a normally bottommost connector portion adapted for coupling to said rim, said connector portion also including an inwardly tapering surface complementally configured for mating with said receiving surface of said vessel in sealing engagement, a normally topmost connector portion adapted for coupling to said cover, at least one continuous and uninterrupted cylindrical riser wall, and a plurality of axially spaced continuous and circumscribing ribs positioned radially outward of said riser wall, each of said ribs including a pair of substantially horizontal flanges radially oriented in a plane transverse to the longitudinal axis of the riser and

connecting said ribs to said riser wall, said flanges each being complementally sized and configured relative to said rim whereby said a circumscribing cut through one of said ribs or said riser wall adjacent said flange will reduce the longitudinal length of said riser and whereby the remaining, normally bottommost flange of the riser may be coupled to the rim in sealing engagement.

2. (Original) A subterranean tank assembly as set forth in claim 1, wherein said cover includes an interior wall surface having at least one lug oriented substantially radially inwardly and said rim includes an outer wall surface having at least one recess complementally configured to receive said lug.

3. (Original) A subterranean tank assembly as set forth in claim 1, wherein said rim includes a circumferentially extending elastomeric seal surrounding said opening and positioned for engagement with either said bottommost connector portion or, when said bottommost connector portion has been removed from said riser, the bottommost flange of the riser.

4. (Original) A subterranean tank assembly as set forth in claim 3, wherein said rim includes a circumferentially extending slot for receiving a part of said seal therein.

IX. EVIDENCE APPENDIX

There was no evidence submitted by Applicant or entered by the Examiner and relied upon by appellant in this appeal.

X. RELATED PROCEEDINGS APPENDIX

There are no known proceedings related to this appeal.



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application of: BOLZER, Todd

Docket No. 32183

Serial No.: 10/055,440

Conf. No.: 7938

Filed: January 23, 2002

Group Art Unit No. 3727

Title: ROTATIONALLY MOLDED SEPTIC
TANK WITH RISER

Examiner: Stephen J. CASTELLANO

TRANSMITTAL

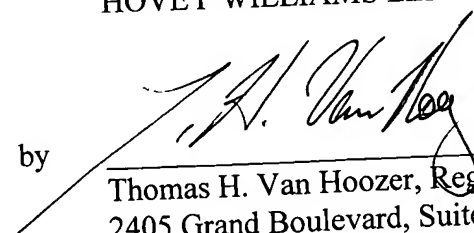
Transmitted herewith is/are: Transmittal (1 pg); Appeal Brief in response to Final Office Action dated August 5, 2004 (29 pgs); Copy of Office Action dated Aug. 5, 2004 as Exhibit A (8 pgs); FIVE drawing sheets as Exhibit B (5 pgs); check in the amount of \$250.00 for small entity Appeal Brief filing fee; and return postcard. This/These document(s) is/are being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 CFR 1.10 in an envelope addressed to: Mail Stop APPEAL BRIEF - PATENTS, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on February 2, 2005.

EV 597771136 US

Respectfully submitted,

HOVEY WILLIAMS LLP

by


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(Docket No. 32183)



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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/055,440	01/23/2002	Todd Bolzer	32183	7938

7590 08/05/2004

Hovey, WILLIAMS, TIMMONS & COLLINS
Suite 400
2405 Grand Blvd
Kansas City, MI 64108

EXAMINER

CASTELLANO, STEPHEN J

ART UNIT PAPER NUMBER

3727

DATE MAILED: 08/05/2004

RECEIVED

AUG 09 2004

HOVEY WILLIAMS LLP

Please find below and/or attached an Office communication concerning this application or proceeding.

ALECTO

AUG 09 2004

ENTERED BY sgm



Office Action Summary

Application No.

10/055,440

Applicant(s)

BOLZER ET. AL.

Examiner

Stephen J. Castellano

Art Unit

3727

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 21 April 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-4 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-4 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

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The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claim 1 is rejected under 35 U.S.C. 102(b) as being anticipated by the catalog of AK Industries, Inc. (the AKI catalog).

The AKI catalog discloses a subterranean tank assembly for storing liquid below grade, the tanks comprising a vessel, a cover and a riser, page 12 provides a pictorial representation of a pump tank which shows the vessel, cover and riser connected together, various risers and lids are disclosed on page 7, the vessel, cover and riser are made of a synthetic resin material, specifically, polyethylene, the riser includes an inner cylindrical riser wall, axially spaced, circumscribing ribs spaced outwardly of the riser wall, the ribs including a pair of substantially horizontal flanges.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 1 is rejected under 35 U.S.C. 103(a) as being unpatentable over the AKI catalog in view of Jones and Hall.

The AKI catalog discloses a subterranean tank assembly for storing liquid below grade, the tanks comprising a vessel, a cover and a riser, page 12 provides a pictorial representation of a pump tank which shows the vessel, cover and riser connected together, various risers and lids are

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disclosed on page 7, the vessel, cover and riser are made of a synthetic resin material, specifically, polyethylene, the riser includes an inner cylindrical riser wall, axially spaced, circumscribing ribs spaced outwardly of the riser wall, the ribs including a pair of substantially horizontal flanges. The vessel has a portal (access hole - see Fig. 1 in top right corner of page 6, also large opening has depicted at right side of page 6 is believed to be similar) projecting generally upwardly from the vessel wall, the portal includes a rim having a substantially horizontal circumferentially extending closure surface in surrounding relationship to a portal opening. The riser is best depicted on page 12 as being connected to the access opening and the cross section is shown in the top right figure on page 7.

The AKI catalog discloses the invention except for an inwardly tapering receiving surface on the portal rim of the vessel and an inwardly tapering complementary surface on the bottommost connector portion of the riser.

Jones teaches a sewer construction wherein the vessel is a tee fitting 16 having a bifurcated foot 34b situated at its top with a top portal rim (spigot 34c) and the riser is a bottom section (pipe encasement 36) with a bottommost connector (bell socket 36b). The rim includes a horizontal surface and an inwardly tapering receiving surface and the bottommost connector includes an inwardly tapering complementary surface mating with the receiving surface of the rim of the vessel.

Hall teaches a manhole structure wherein the vessel is manhole substructure 10 having a top ring 11 with a top portal rim and the riser is a bottom section (bottommost plastic extender ring 15) with a bottommost connector. The rim includes a horizontal surface and an inwardly

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tapering receiving surface and the bottommost connector includes an inwardly tapering complementary surface mating with the receiving surface of the rim of the vessel.

It would have been obvious to modify the configuration of the riser to vessel connection to include both a horizontal surface on the vessel rim and inwardly tapering surfaces to provide an aligning fit to ensure that the riser is properly centered and to ensure that the top of the riser is situated horizontally.

Claim 2 is rejected under 35 U.S.C. 103(a) as being unpatentable over the AKI catalog in view of Jones and Hall as applied to claim 1 above, and further in view of Wittenberg.

The combination discloses the invention except for the lug on the cover and the recess on the vessel rim. Wittenberg teaches in the Fig. 1-10 a cover that includes an interior wall surface having a least one lug oriented substantially radially inwardly and a vessel rim that includes an outer wall surface having at least one recess configured to receive the lug. It would have been obvious to add the lug and recess arrangement in order to provide a securing means that includes more than one direction of motion to both attach and remove the closure so that the closure isn't removed, inadvertently.

Claim 2 is rejected under 35 U.S.C. 103(a) as being unpatentable over the AKI catalog in view of Jones and Hall as applied to claim 1 above, and further in view of Wittenberg and Seizert et al. (Seizert).

The AKI catalog discloses the invention except for the seal and the slot in the rim for receiving the seal. Wittenberg teaches in the Fig. 12 embodiment a circumferentially extending elastomeric seal 53 that is situated within a circumferentially extending slot on the rim. Seizert teaches a seal (44, 144, 244, 444) and a slot (22, 122, 222, 422), respectively. It would have

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been obvious to add the seal and slot arrangement to the rim in order to form a liquid tight seal with either a cover or another pipe connected to the vessel at the rim to prevent a liquid leak at this joint.

Applicant's arguments with respect to claims 1-4 have been considered but are moot in view of the new ground(s) of rejection.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a).

Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).


A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Stephen J. Castellano whose telephone number is 703-308-1035. The examiner can normally be reached on M-Th 6:30-5.

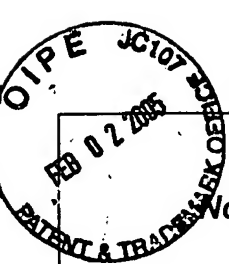
If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Lee W. Young can be reached on 703-308-2572. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


Stephen J. Castellano
Primary Examiner
Art Unit 3727

sjc

**Notice of References Cited**

Application/Control No.

10/055,440

Applicant(s)/Patent Under
Reexamination
BOLZER ET AL.

Examiner

Stephen J. Castellano

Art Unit

3727

Page 1 of 1

U.S. PATENT DOCUMENTS

*		Document Number Country Code-Number-Kind Code	Date MM-YYYY	Name	Classification
	A	US-5,525,007	06-1996	Jones et al.	405/52
	B	US-4,187,647	02-1980	Hall, John R.	52/20
	C	US-			
	D	US-			
	E	US-			
	F	US-			
	G	US-			
	H	US-			
	I	US-			
	J	US-			
	K	US-			
	L	US-			
	M	US-			

FOREIGN PATENT DOCUMENTS

*		Document Number Country Code-Number-Kind Code	Date MM-YYYY	Country	Name	Classification
	N					/
	O					
	P					
	Q					
	R					
	S					
	T					

NON-PATENT DOCUMENTS

*		Include as applicable: Author, Title Date, Publisher, Edition or Volume, Pertinent Pages)
	U	
	V	
	W	
	X	

*A copy of this reference is not being furnished with this Office action. (See MPEP § 707.05(a).)
Dates in MM-YYYY format are publication dates. Classifications may be US or foreign.

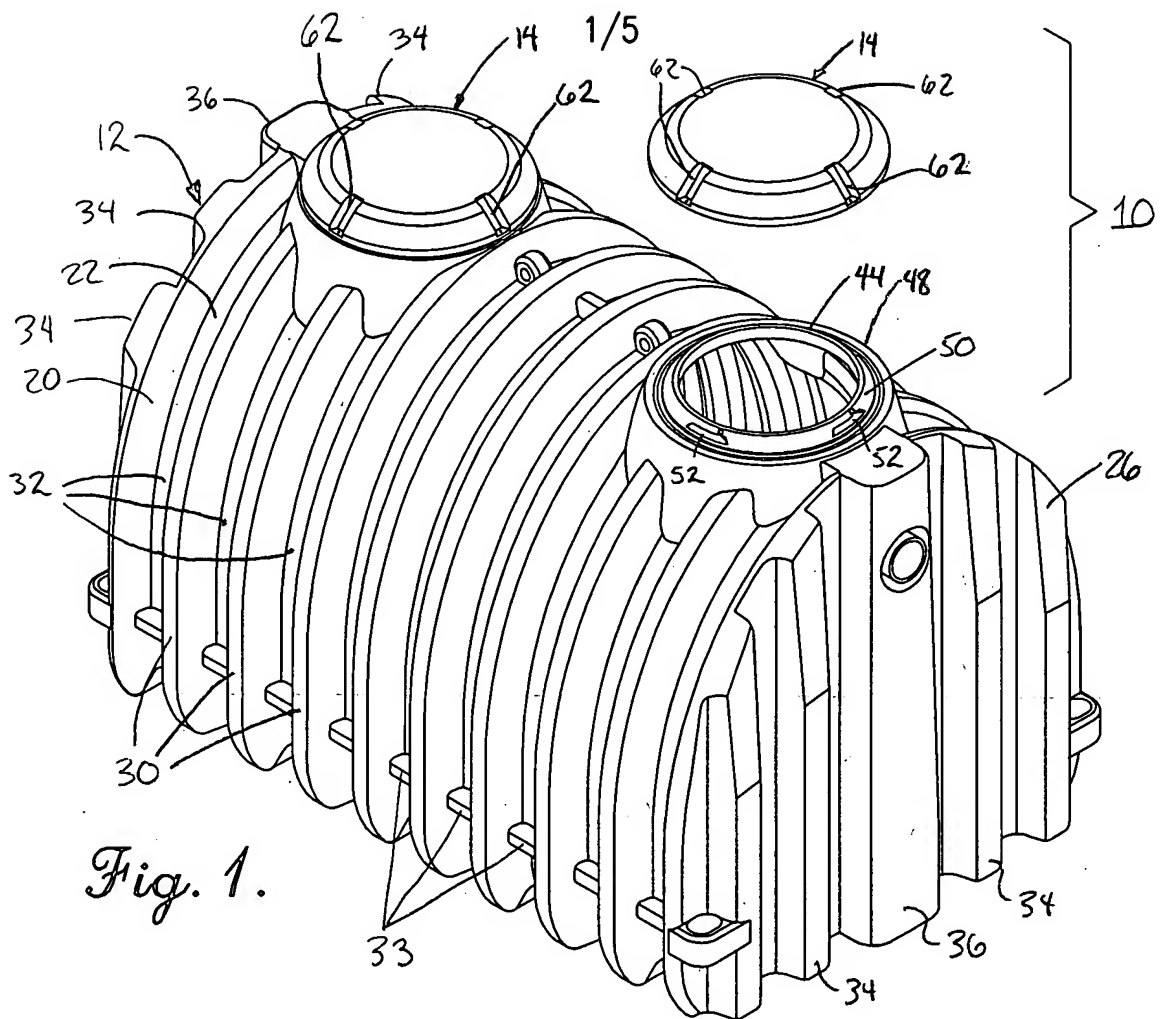


Fig. 1.

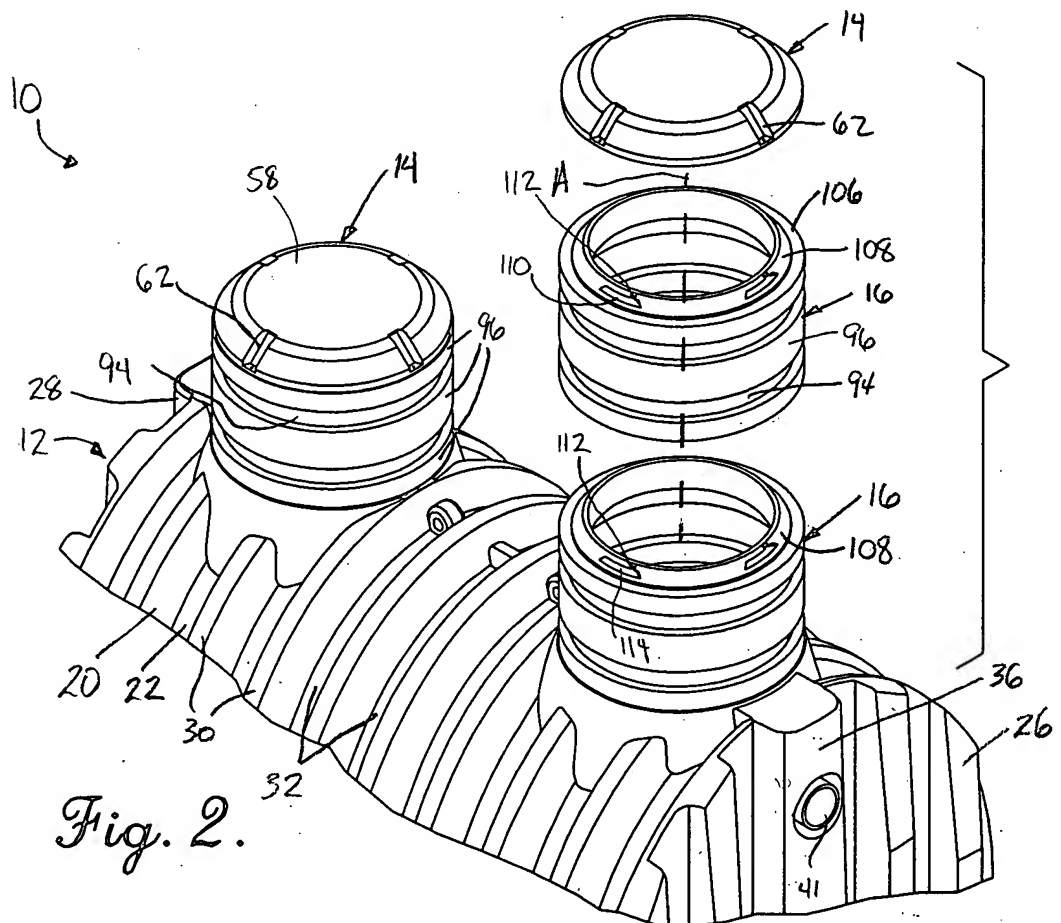


Fig. 2.



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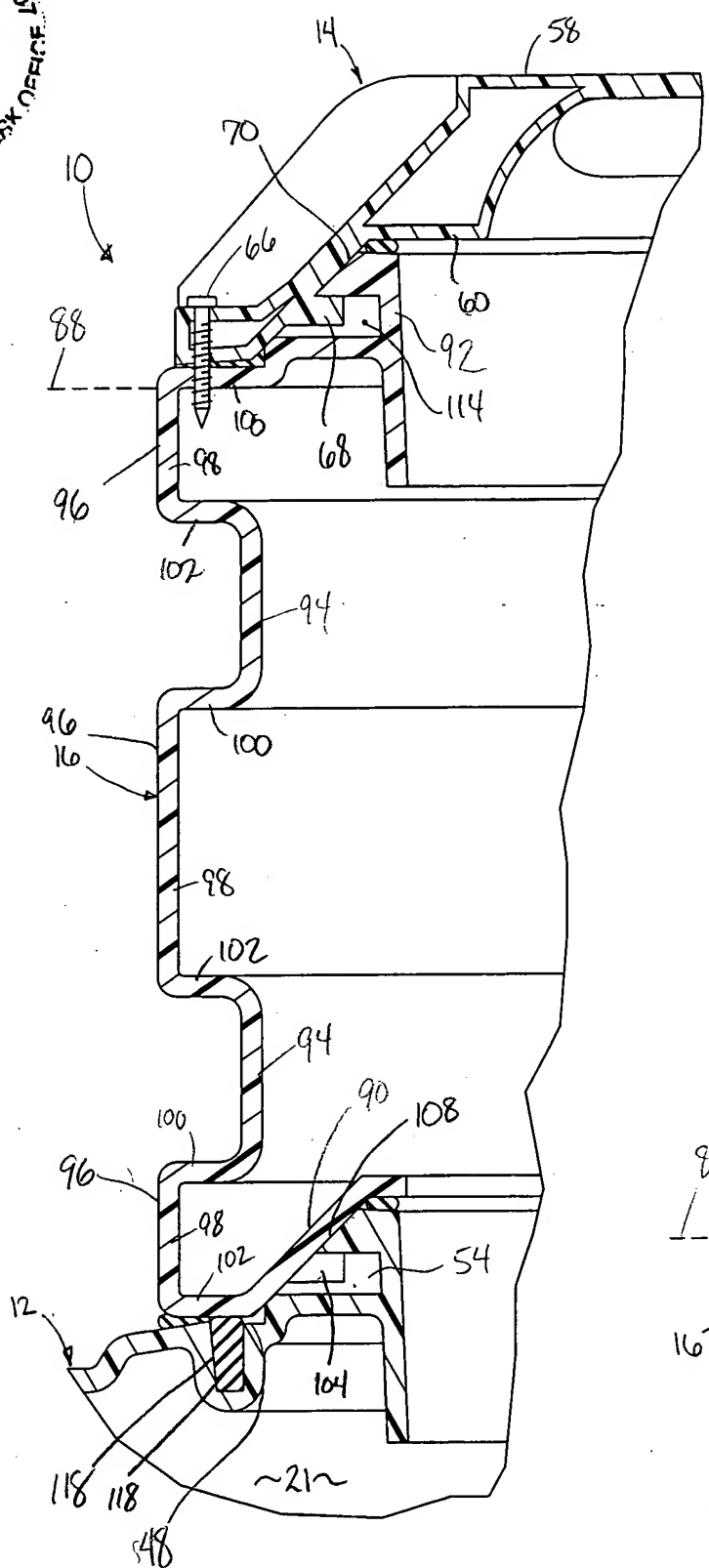


Fig. 4.

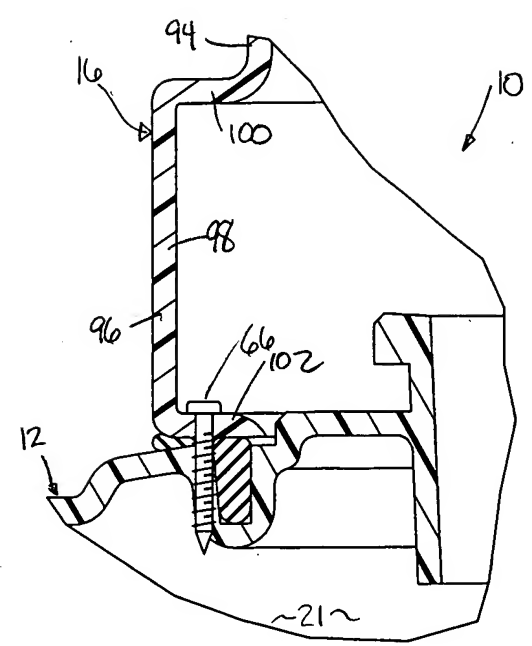


Fig. 5.

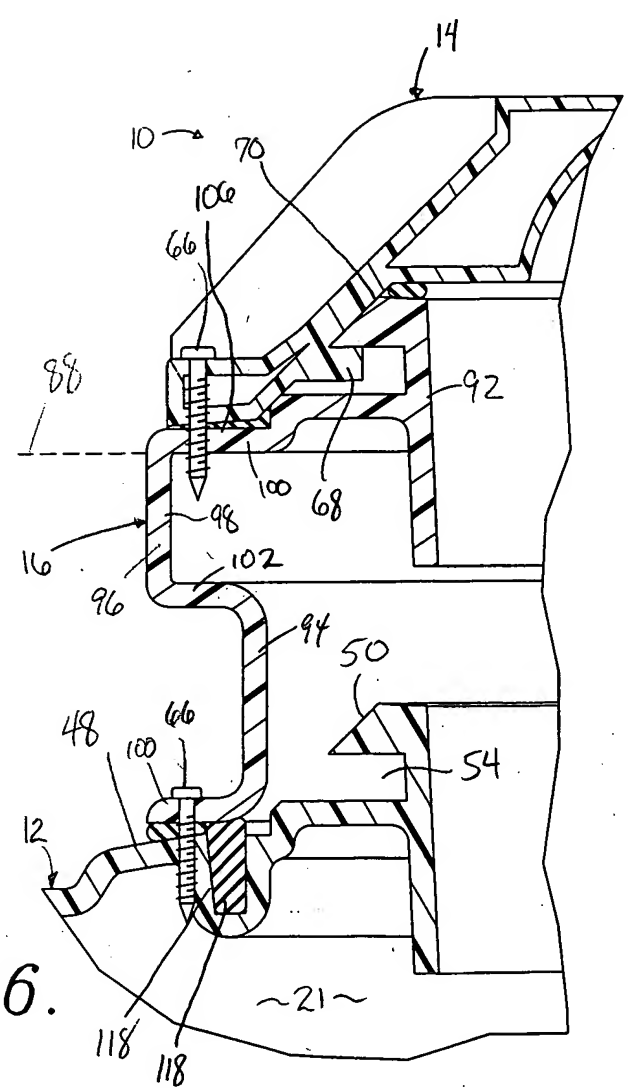


Fig. 6.

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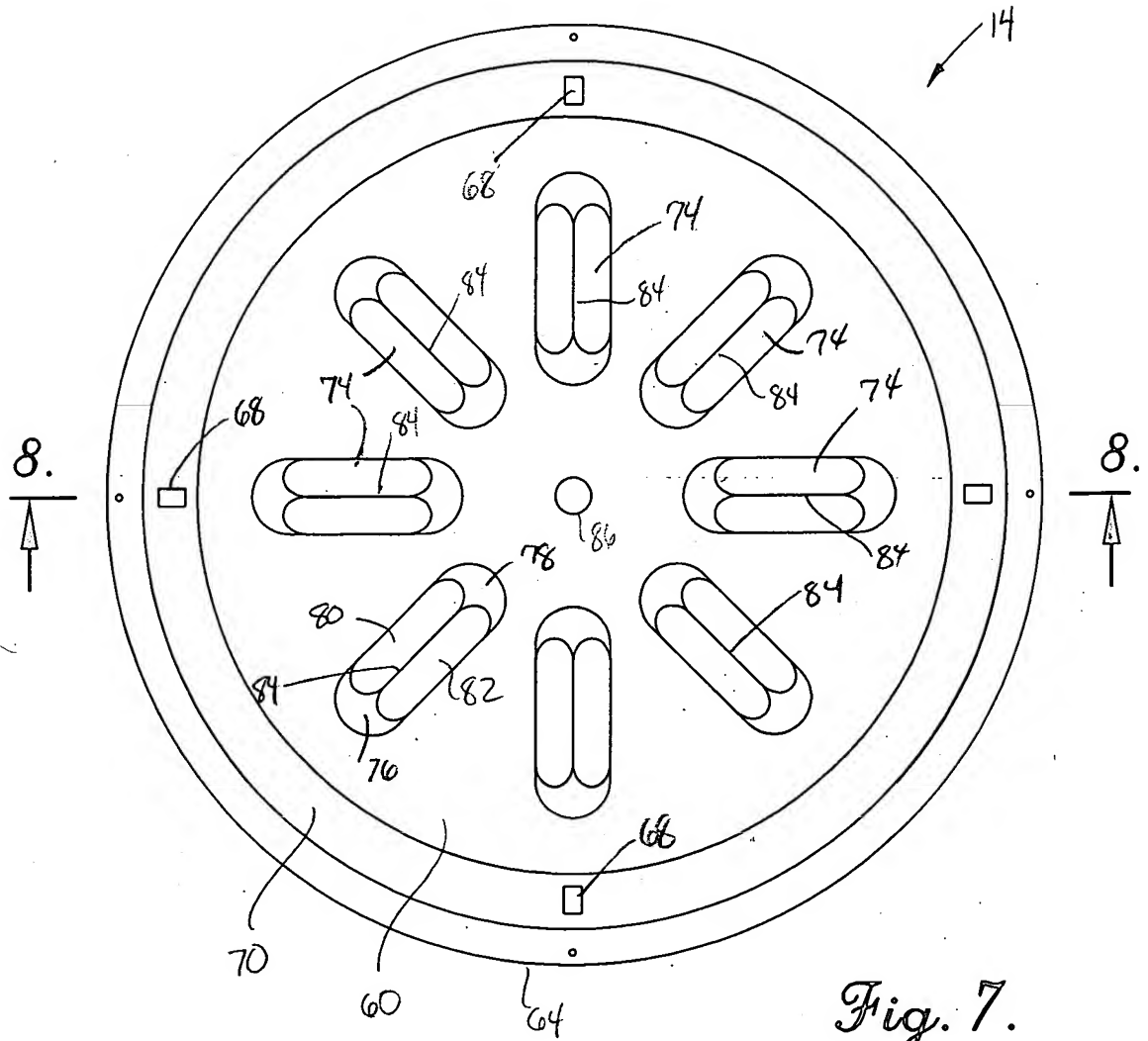


Fig. 7.

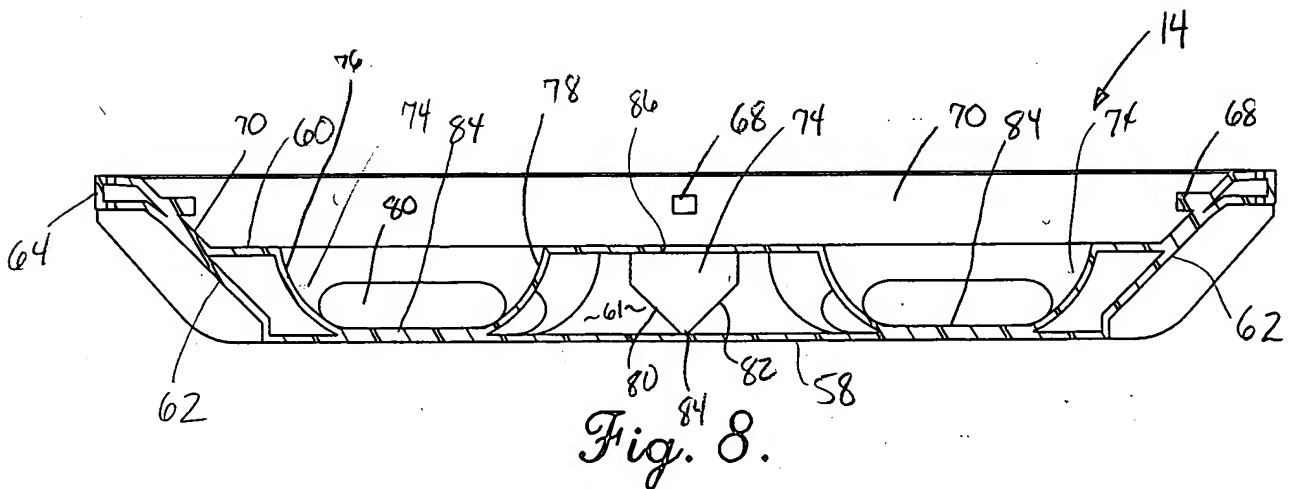


Fig. 8.

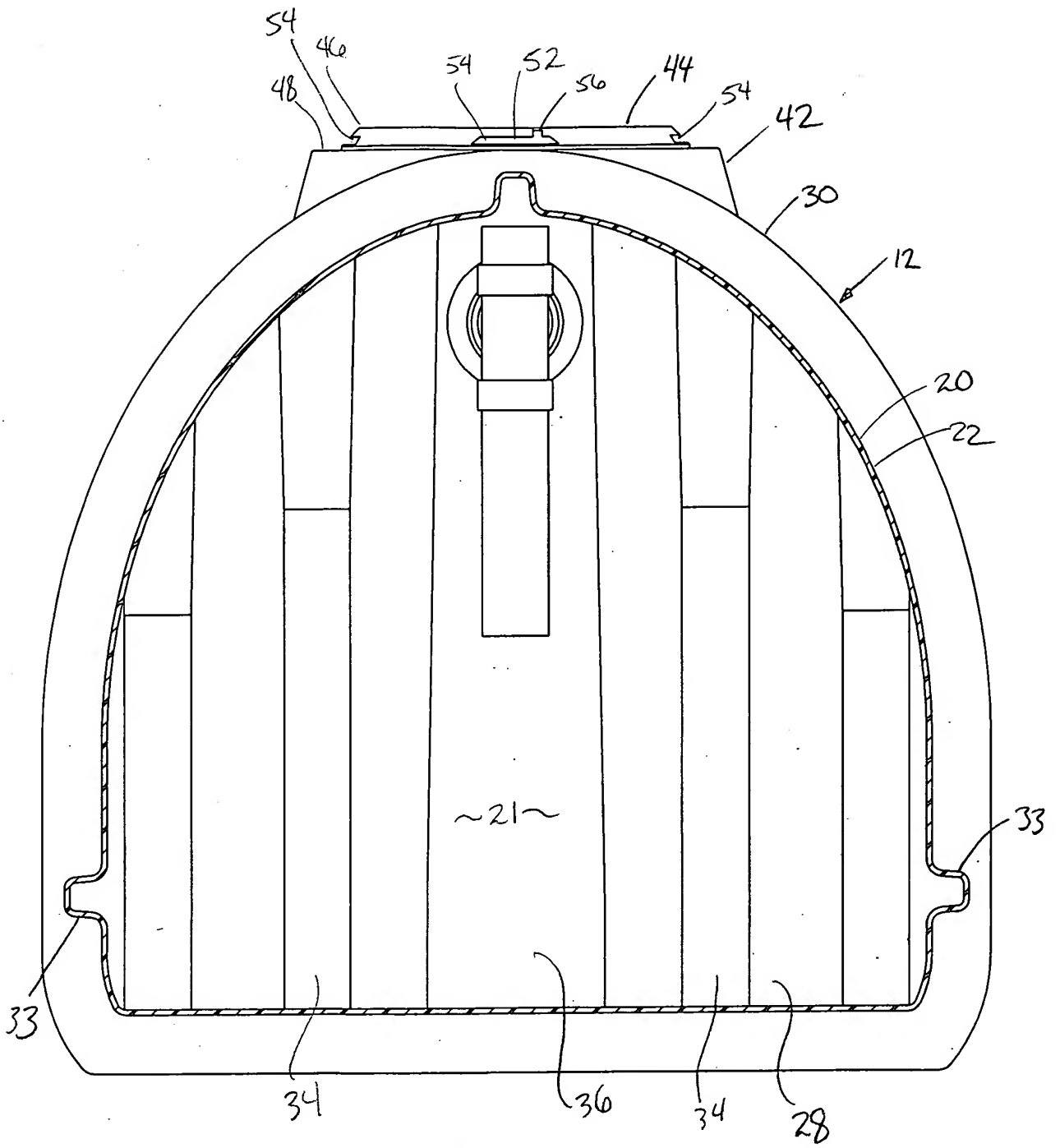
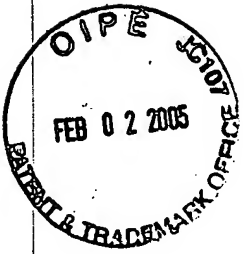


Fig. 9.